In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-410

JAMES E. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of willfully attempting to evade and defeat his income tax for the years 1968, 1969, and 1970, in violation of Section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. 7201. He was sentenced to concurrent terms of three years' imprisonment. The court of appeals affirmed (Pet. App.).

The prosecution was based on the net-worth method of proof. The evidence showed that petitioner's net worth increased as follows (Supp. Tr. 73-74):[1]

December 31, 1967	3,700.00
December 31, 1968	40,034.51
December 31, 1969	67,960.63
December 31, 1970	105,077.63

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[1] "Tr." and "Supp. Tr." refer to the primary and supplemental transcripts of the trial proceedings, respectively.

During those years, petitioner reported little or no income. His true income tax liability for 1968, a year for which he filed no tax return, was $12,970.61; for 1969, his true tax liability was $8,652.89, as compared with the $776.32 indicated on his return; and for 1970, it was $12, 358.57, compared with the $642 reported on his return (Supp. Tr. 83-84).

In this Court, petitioner makes five contentions: (1) that the evidence to establish his beginning net worth was insufficient; (2) that the government did not adequately pursue "leads" that he furnished; (3) that there was insufficient proof that the net worth increases arose from taxable income; (4) that the net worth increases were not properly allocated to the appropriate tax years; and (5) that there was no evidence of an affirmative act of evasion as to the year 1968.

1. The net worth starting point was established with reasonable certainty. The proof showed that at the end of 1967, when petitioner was 32 years old, his only assests were a motorcycle and a car worth $3,700 (Supp. Tr. 56-74). Despite petitioner's claim that he had by that time accumulated $50,000 in undeposited cash (Tr. 216, 241), the evidence showed that no such hoard could have been saved. Prior to 1964, petitioner had been employed first at parking garages in Washington, D.C., where he was paid no more than $1.10 per hour, plus tips (Tr. 207, 211), and then as a press cleaner, starting as an apprentice and working his way up to a wage of $3 per hour (Tr 214-215, 216, 240). Petitioner claimed that by the end of 1963, his alleged cash hoard of $50,000 was complete, although he admits that it had not been reported on his income tax returns (Tr. 214, 216, 241; Pet. 12). Petitioner testified that he hid his $50,000 in a box and never deposited it in any bank account or even considered

doing so (Tr. 241). From the latter part of 1964 until the early part of 1966 petitioner was unemployed (Tr. 242). Petitioner reported income of only $1,894.93 for the year 1966 (Tr. 242) and $4,368 for 1967 (Tr. 243).

2. Petitioner furnished no "leads" that required government investigation. He informed investigating agents that the most undeposited cash he had ever had on hand was between $20,000 and $30,000, which he and his wife had accumulated, but he could not remember when he had had it or where he had kept it, nor did he offer any explanation as to its source (Tr. 196). The government is required only to investigate leads that, if true, would tend to establish the taxpayer's innocence and that, further, are reasonably susceptible of being checked. *Holland* v. *United States,* 348 U.S. 121, 135-136.

3. The evidence established that the net worth increases arose from current taxable income. The government may proceed in either of two ways to make such a showing: (1) prove that the taxpayer had a likely source of unreported income *(Holland* v. *United States, supra,* 348 U.S. at 137-138); or (2) prove that the net worth increases did not arise from nontaxable sources, such as gifts or inheritances. *Massei* v. *United States,* 355 U.S. 595. The government here proved both. It proved that during the prosecution years petitioner had an interest in three different active businesses (Tr. 173-174, 176-178, 220-221, 223-224, 227); moreover, petitioner admitted to having gambled in the past on a rather extensive scale, and gambling is "an occupation with indeterminate possibilities." *United States* v. *Costello,* 221 F.2d 668, 672 (C.A. 2), affirmed, 350 U.S. 359. The government also gave petitioner credit for all nontaxable funds received by him or his wife as shown by the investigation (Supp. Tr. 79-80); petitioner admitted that he had never received any

inheritances, and his claim of having received gifts was vague and unsubstantiated (Tr. 179).

4. The evidence properly allocated the net worth increases to the appropriate taxable years. Petitioner's argument to the contrary is merely a restatement of his claim that his funds derived from an earlier cash hoard.

5. Finally, the government proved an affirmative act of evasion as to the year 1968. The proof showed that during that year petitioner had substantial dealings in currency (see, *e.g.*, Tr. 82, 88-89, 99-100), and the jury could well have found that this constituted "handling of one's affairs to avoid making the records usual in transactions of the kind, and * * * conduct, the likely effect of which would be to mislead or to conceal." *Spies* v. *United States*, 317 U.S. 492, 499. Moreover, since the prison sentences were concurrent and no fines were imposed, petitioner's contention as to 1968 is not sufficient, standing alone, to justify discretionary review. See, *e.g.*, *Barnes* v. *United States*, 412 U.S. 837, 848 and n. 16.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.